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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

RICARDO AHUMADA-AGUILAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Section 309(a) of the Immigration and Nationality Act, 8 U.S.C. 1409(a), a child born abroad out of wedlock to a father who is a citizen of the United States and a mother who is not a citizen becomes a citizen of the United States, as of his or her date of birth, only if, among other things, paternity is formally established by legitimation, written acknowledgment, or court decree while the child is under the age of 18, and the father agrees in writing to provide financial support for the child during the child's minority. As in *Miller* v. *Albright*, 523 U.S. 420 (1998), the questions presented are:

1. Whether respondent has third-party standing to assert the equal protection rights of his citizen father, who died in 1994 (when respondent was 22) without ever having had contact with respondent.

2. Whether the requirements for transmission of citizenship imposed by Section 1409(a) violate the equal protection component of the Due Process Clause.

3. Whether the court of appeals had the power to declare respondent to be a citizen of the United States, in the absence of a statute conferring citizenship.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 189 F.3d 1121. That court's initial opinion (App., *infra*, 24a-32a) was withdrawn (see App., *infra*, 22a). The district court did not enter a written opinion. See App., *infra*, 33a-39a (transcript).

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1999. A petition for rehearing was denied on December 22, 1999 (App., *infra*, 40a). On March 13, 2000, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including April 20, 2000, and on April 10 she further extended the

time until May 20, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 4 of the United States Constitution provides in pertinent part:

> The Congress shall have Power * * * [t]o establish an uniform Rule of Naturalization * * * throughout the United States.

2. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

3. Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

4. Section 309 of the Immigration and Nationality Act (INA), ch. 477, 66 Stat. 238 (1952), as amended, 8 U.S.C. 1409, provides in pertinent part:

> **Children born out of wedlock**
>
> (a) The provisions of paragraphs (c), (d), (e), and (g) of section 301 [8 U.S.C. 1401], and of paragraph (2) of section 308 [8 U.S.C. 1408], shall apply as of the date of birth to a person born out of wedlock if—

(1) a blood relationship between the person and the father is established by clear and convincing evidence,

(2) the father had the nationality of the United States at the time of the person's birth,

(3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and

(4) while the person is under the age of 18 years —

(A) the person is legitimated under the law of the person's residence or domicile,

(B) the father acknowledges paternity of the person in writing under oath, or

(C) the paternity of the person is established by adjudication of a competent court.

* * * * *

(c) Notwithstanding the provision of subsection (a) of this section, a person born, after December 23, 1952, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United

States or one of its outlying possessions for a continuous period of one year.

5. Section 301 of the INA, 66 Stat. 238, as amended, 8 U.S.C. 1401, provides in pertinent part*:

Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(a) a person born in the United States, and subject to the jurisdiction thereof;

* * * * *

(c) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

* * * * *

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States,

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* The "outlying possessions" of the United States are American Samoa and Swains Island. 8 U.S.C. 1101(a)(29).

or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

STATEMENT

1. Section 309(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1409(a), permits a child born outside the United States to unmarried parents to claim United States citizenship on the basis of the child's relation to a United States citizen father, so long as (i) there is "clear and convincing evidence" of a blood relationship between the child and the father, (ii) the father agrees in writing to provide financial support for the child while the child is under the age of 18, and (iii) before the child turns 18 there is some formal legal recognition of paternity, either by legitimation under the laws of the child's residence or domicile, by adjudication of a competent court, or by the father's execution of an acknowledgment in writing under oath. The citizen father must also meet a residency requirement imposed, through Section 1409(a), by Section 1401(c), (d), (e) or (g).

Section 309(c) of the INA, 8 U.S.C. 1409(c), permits a child born abroad out of wedlock to claim citizenship on the basis of his or her relation to a citizen mother, so long as the mother was physically present in the United States, before the child's birth, for a continuous period of at least one year.

2. Respondent's father, Frederick Deutenberg, met his mother, Genoveva Hernandez, in December 1970 at a restaurant in Nogales, Mexico. Hernandez was 19 years old and a citizen of Mexico. Deutenberg was 50 years old and a citizen of the United States. They never married. App., *infra*, 3a.

During the first half of 1971, Deutenberg and Hernandez traveled together in the United States. That spring Hernandez became pregnant. When she told Deutenberg, he became angry. He gave Hernandez a small suitcase and $75 to purchase a ticket back to Mexico. She returned there toward the end of the summer. Respondent was born in Guadalajara, Mexico, in December 1971. Although Hernandez made various efforts to locate Deutenberg, so far as appears she never saw, spoke to, or corresponded with him again, and Deutenberg never had any contact with his son. Deutenberg died in April 1994. App., *infra*, 3a-4a, 39a.

Hernandez entered the United States in 1976, bringing respondent with her. In 1985 she married a United States citizen, gained legal residency for herself, and assisted respondent in becoming a legal resident. In December 1990, respondent was convicted of felony possession of cocaine, and a year later he was deported to Mexico. He returned to the United States unlawfully, was deported again in 1994, and again returned unlawfully. App., *infra*, 4a-5a.

3. In 1995, a grand jury charged respondent with two counts of entering the United States unlawfully

after having been deported. He moved to dismiss the indictment, claiming, among other things, that he is a citizen of the United States, by virtue of his father's citizenship. On the basis of an offer of proof by respondent's counsel, the district court found that respondent could likely show that Deutenberg was his father and was a citizen at the time of respondent's birth, thus potentially satisfying Section 1409(a)(1) and (2), but that he could not produce any evidence of compliance with Section 1409(a)(3) (agreement by his father to provide financial support until respondent reached age 18) or (a)(4) (formal legitimation or acknowledgment before respondent reached age 18). The court therefore precluded respondent from arguing that he was a citizen. After a bench trial on stipulated facts, the court found respondent guilty of illegal reentry. App., *infra*, 5a-7a.

4. The court of appeals initially affirmed. App., *infra*, 24a-32a. Applying circuit precedent, the court rejected respondent's argument that Section 1409(a) violates the equal protection rights of citizen fathers by imposing greater requirements on them than on citizen mothers for the transmission of their United States citizenship to children born abroad out of wedlock. *Id.* at 24a-25a.[1] The court later agreed, however, to hold the case in abeyance pending this Court's decision in *Miller* v. *Albright*, 523 U.S. 420 (1998). App., *infra*, 23a. After *Miller*, the court vacated its original decision (*id.* at 22a), and a divided panel reversed. *Id.* at 1a-21a.

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[1] Judge Norris dissented on the ground that the procedures used at respondent's original deportation hearing did not comport with due process. App., *infra*, 27a-32a. He did not question the majority's rejection of respondent's claim to citizenship.

The court held that respondent had third-party standing to assert a violation of his father's constitutional rights, distinguishing *Miller* in that regard on the basis that respondent's father, unlike Miller's, was dead, and therefore faced a "substantial hindrance" to the assertion of his own rights. App., *infra*, 12a. The court interpreted Justice O'Connor's opinion concurring in the judgment in *Miller* as concluding that Section 1409 "violate[s] * * * the equal protection rights of [a] claimant's [citizen] parent." *Id.* at 11a. Combining its ruling on standing, its interpretation of the views of Justices O'Connor and Kennedy, and the views expressed by Justices Souter, Ginsburg and Breyer in dissent in *Miller*, the court concluded that "had the facts in *Miller* been like those in this case [that is, had Miller's father been dead], a majority of the Court would have found § 1409(a)(4) unconstitutional by applying heightened scrutiny." *Id.* at 12a. Seeing "no reason to distinguish" between paragraphs (3) and (4) of Section 1409(a), the court also held paragraph (3) unconstitutional. *Id.* at 13a. Having struck those provisions, the court concluded (*id.* at 14a):

> The evidence in the record sufficiently demonstrates that [respondent] is the child of a U.S. citizen father, satisfying the requirements of § 1409(a)(1) and (a)(2). Therefore, the judgment of conviction is reversed and the case remanded with instructions to vacate the conviction.

Judge Kleinfeld dissented, relying on this Court's judgment in *Miller* and on Ninth Circuit cases. App., *infra*, 14a-21a. In his view, the court was "bound by precedent of our court, the Supreme Court, and our court construing the Supreme Court decision, to reject" respondent's claim of citizenship. *Id.* at 16a-17a.

REASONS FOR GRANTING THE PETITION

Section 309 of the INA, 8 U.S.C. 1409, prescribes the terms on which a United States citizen parent may transmit his or her citizenship to a child born outside the United States and out of wedlock. Three Terms ago, this Court granted review of a decision that sustained the constitutionality of Section 1409 insofar as it distinguishes, in that regard, between the children of citizen mothers and those of citizen fathers. See *Miller* v. *Albright*, 523 U.S. 420, 428 (1998) (opinion of Stevens, J.). The Court ultimately affirmed the judgment in that case, but no opinion addressing the question whether those statutory distinctions violate the equal-protection rights of citizen fathers attracted the support of a majority of the Court. See *id.* at 423-445 (opinion of Stevens, J.) (rejecting equal-protection challenge to Section 1409(a)(4)); *id.* at 445-452 (O'Connor, J., concurring in the judgment) (declining to reach equal protection challenge); *id.* at 452-459 (Scalia, J., concurring in the judgment) (same); *id.* at 471-490 (Breyer, J., dissenting) (concluding that paragraphs (a)(3) and (4) violate equal protection); *id.* at 460 (Ginsburg, J., dissenting) (same).

In the present case, a divided panel of the Ninth Circuit held that respondent Ahumada-Aguilar, unlike the petitioner in *Miller*, has standing to assert the equal protection rights of his citizen father. The court then read the various opinions in *Miller* to compel the conclusion that the distinctions drawn by paragraphs (3) and (4) of Section 1409(a) violate those rights. As a remedy, the court effectively declared respondent to be a citizen of the United States. Those erroneous rulings warrant intervention by this Court.

1. This Court has held that one party to a lawsuit may assert the constitutional rights of a third party who is absent from the litigation if, but only if, the litigant has suffered an injury in fact, the litigant has a "close relation" to the party whose rights are asserted, and there is "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 411 (1991); see also, *e.g.*, *Miller*, 523 U.S. at 445-447 (O'Connor, J., concurring in the judgment); *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623-624 n.3 (1989); *Singleton* v. *Wulff*, 428 U.S. 106, 113-116 (1976) (opinion of Blackmun, J.); *Warth* v. *Seldin*, 422 U.S. 490, 499-500 (1975); *McGowan* v. *Maryland*, 366 U.S. 420, 429-430 (1961). Those prudential restrictions "arise[] from the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question, as well as from the belief that 'third parties themselves usually will be the best proponents of their rights.'" *Miller*, 523 U.S. at 446 (O'Connor, J., concurring in the judgment) (quoting *Singleton*, 428 U.S. at 113-114 (opinion of Blackmun, J.)).

The court of appeals accorded respondent standing to assert his father's rights on the theory that respondent's father died in 1994, and therefore faces a "substantial hindrance" to the vindication of his own rights in litigation. App., *infra*, 12a. In the court's view, that circumstance distinguished this case from *Miller*, where Miller's father was alive but not a party before this Court, and justified the conclusion that "had the facts in *Miller* been like those in this case, a majority of the Court would have found § 1409(a)(4) unconstitutional." *Id.* at 11a-12a (reasoning that three Justices would have found sufficient "hindrance," and therefore third-party standing, in *Miller*, while two others

concluded that there was no third-party standing because Miller's father faced no substantial hindrance to the assertion of his own rights). There are, however, two critical flaws in that analysis.

a. First, although respondent's father died in 1994, he was alive for the first 22 years of respondent's life. During that time he had ample opportunity either to comply with the citizenship-transmission requirements imposed on fathers by Section 1409, or to claim that those requirements violated his right to equal protection of the laws.

Any holding that a "hindrance" existed for purposes of third-party standing embodies a conclusion that, in view of "legitimate obstacles * * * beyond the control of the rightholder, that party's absence from a suit more likely stems from disability than from disinterest." *Miller*, 523 U.S. at 450 (O'Connor, J., concurring in the judgment). Before according standing to a third party, the court should therefore have some good reason to believe that "the rightholder did not simply decline to bring the claim on his own behalf, but could not in fact do so." *Ibid.*; cf. *id.* at 474 (Breyer, J., dissenting) (concluding that government "hindered" Miller's father's assertion of his rights by moving to have him dismissed as a plaintiff in the case).[2]

Where the claimed hindrance to direct assertion of a right is that the rightholder is dead, a court may not

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[2] Proper analysis must also take account of whether the nature of a hindrance is such that the right in question "likely will not be asserted—and thus the relevant law will not be enforced—unless the Court recognizes third-party standing." *Miller*, 523 U.S. at 450 (O'Connor, J., concurring in the judgment). As in *Miller*, see *ibid.*, that concern is not present here, because there is no systemic barrier that will hinder all fathers from asserting the right at issue if they so choose. See App., *infra*, 21a (Kleinfeld, J., dissenting).

properly conclude that the rightholder's absence "more likely stems from [that] disability than from disinterest" without taking account of at least two salient factors. What opportunity, if any, the rightholder had to assert the right before his or her death, and what likelihood there is that the person who actually held the right would have wanted to assert it. For example, from both those functional perspectives, it made sense in *Hodel* v. *Irving*, 481 U.S. 704, 711-712 (1987), to accord third-party standing to the heirs or devisees of deceased holders of fractional interests in Indian trust lands. The statute challenged in *Hodel* had been passed shortly before the holders' deaths, see *id.* at 709, and the Secretary of the Interior, who would normally have played the role of a traditional executor or administrator with respect to surviving claims involving trust property, could, the Court concluded, "hardly be expected to assert [the] decedents' rights to the extent they turned on" the asserted unconstitutionality of an Act of Congress. *Id.* at 711. Moreover, the established law of testate and intestate succession reflects the common experience that individuals care deeply about, and are highly likely to assert, the right to pass their property on at death to those of their own choosing, or to those the law identifies as the natural objects of their bounty. Cf. *id.* at 711-712.

The present case, by contrast, involves a constitutional claim that first accrued two decades before the death of the individual whose right is being asserted. Neither respondent nor the court of appeals has suggested any special way in which the rightholder was "hindered" from asserting that right himself during his lifetime, had he desired to do so. See App., *infra*, 17a-18a (Kleinfeld, J., dissenting). It is, moreover, more difficult to predict a given parent's likely wishes with

respect to the assertion of the right at issue in this case—especially where the father had no contact whatsoever with the child during his lifetime—than it was in *Hodel* to predict an individual's likely wish to assert a right to control the disposition of his or her estate, after death, to persons with whom there was a closer relationship. See *id.* at 18a-19a (Kleinfeld, J., dissenting) (noting that in a case like this one, "the father's interest may be adverse to the child's," and that "[t]he only fact in the record bearing on the father's interest was that he sent the mother packing"). Under such circumstances there is no reason to allow, and certainly no "settled practice of the courts" of allowing, a third-party litigant to represent the putative interests of an absent rightholder. Compare *Hodel*, 481 U.S. at 712 (quoting *Tyler* v. *Judges of Court of Registration*, 179 U.S. 405, 406 (1900)).[3]

b. The court of appeals also erred in according respondent third-party standing because there is nothing in the record to suggest the existence of the requisite "close relation" between respondent and the individual whose rights he seeks to assert. See *Powers*, 499 U.S. at 411. The court apparently assumed that because

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[3] The court of appeals described Justice O'Connor's opinion in *Miller* as reasoning that Section 1409(a) "violated * * * the equal protection rights of the claimant's parent, but the claimant lacked standing to vindicate those rights *while the parent lived.*" App., *infra*, 11a (emphasis added). The first part of the description is wrong (see note 5, *infra*), but the second part is particularly telling for present purposes, because it suggests that even if respondent's father had consciously declined, during his lifetime, to make the claim presented here, respondent nevertheless would have acquired standing to advance that claim, putatively on his father's behalf, at the moment that his father died. That cannot be the correct result.

several Justices were prepared to hold that there was a "close relationship" between the petitioner and her father in *Miller*, there was no need to address that issue in this case. See App., *infra*, 11a-12a. In *Miller*, however, there was a firm factual predicate for such a holding: By the time of the litigation Miller's father had obtained a voluntary decree of paternity from a state court, and he had originally joined Miller as a plaintiff in the very case before the Court. See 523 U.S. at 425-427 (opinion of Stevens, J.). It was therefore natural for discussions of third-party standing to assume a "'close' and relevant relationship" between Miller and her father, and to focus instead on the question of "hindrance." *Id.* at 473 (Breyer, J., dissenting); see *id.* at 447 (O'Connor, J., concurring in the judgment).

There is no similar factual predicate in this case. To the contrary, the record here indicates that respondent's only relationship with his father was genetic. See App., *infra*, 3a-4a. Genetic paternity is, of course, a "close relation" in one sense, but that is not the sense in which the phrase is used in this Court's cases. See, *e.g.*, *Campbell* v. *Louisiana*, 523 U.S. 392, 398 (1998) (criminal defendant and prospective grand juror); *Powers*, 499 U.S. at 413-414 (criminal defendant and prospective petit juror); *Department of Labor* v. *Triplett*, 494 U.S. 715, 720-721 (1990) (lawyer and client); *Caplin & Drysdale*, 491 U.S. at 623-624 n.3 (lawyer and client); *Craig* v. *Boren*, 429 U.S. 190 (1976) (vendor and customer); *Singleton*, 428 U.S. at 114-115, 117 (opinion of Blackmun, J.) (doctor and patient). Rather, the Court's analysis has focused on whether the litigant and the rightholder have established some actual relationship, "if not a bond of trust," and whether they therefore share a "congruence of interests" with respect to the specific subject matter of the litigation

that "makes it necessary and appropriate for the [litigant] to raise the rights of the" third party, and assures that allowing proxy litigation will result in "little loss in terms of effective advocacy." *Powers*, 499 U.S. at 413-414.

We do not question the close relationship between respondent's own interests and his own assertion, in this context, of the specific legal claim he seeks to make on behalf of his father. Nor is there any reason to doubt that he will be an effective advocate of that claim. The close-relationship inquiry, however, like the hindrance inquiry, is based not only on the need to ensure effective advocacy, but also on "the understanding that the third-party rightholder may not, in fact, wish to assert the claim in question." *Miller*, 523 U.S. at 446 (O'Connor, J., concurring in the judgment); see *Amato* v. *Wilentz*, 952 F.2d 742, 751-752 (3d Cir. 1991) (no sufficient "relationship," despite facially adequate relation and likelihood of vigorous advocacy, where considerations that might have led rightholder not to sue gave rise to doubt about the "identity of interests" between rightholder and litigant); cf. *Gilmore* v. *Utah*, 429 U.S. 1012 (1976) (vacating stay of execution entered at behest of defendant's mother, where defendant himself did not wish to raise any claim). It is also based on the understanding that the relationship between the litigant and the third party may be too attenuated to make it "appropriate" for the litigant to invoke the particular right of the third party. *Powers*, 499 U.S. at 414. For these purposes, in the present context, a bare genetic relationship, without more of substance, is no relationship at all. Compare *Lehr* v. *Robertson*, 463 U.S. 248, 259-261 (1983). The court of appeals erred in concluding otherwise.

c. Because the court below erred in according respondent third-party standing, it also plainly erred in concluding (App., *infra*, 13a) that *Miller* "compels" the invalidation of Section 1409(a)(3) and (4) in this case. Because the relationship between respondent and his father was far more attenuated than the relationship between the petitioner and her father in *Miller*, it follows *a fortiori* from *Miller* that the citizenship claim should fail here as well. At the very least, because respondent lacks standing, the present case cannot be distinguished from *Miller*, and this Court's decision affirming the judgment in *Miller* therefore compels the same—not the opposite—result here. See *id.* at 14a-21a (Kleinfeld, J., dissenting); see also *Terrell* v. *INS*, 157 F.3d 806, 808-809 (10th Cir. 1998) (rejecting citizenship claim, under *Miller*, where citizen father was not a party and no "hindrance" was shown).

Of course, reversal of the judgment below on the same variety of grounds that led to this Court's affirmance of the judgment of the court of appeals in *Miller* would not finally resolve the important constitutional and remedial questions that the court of appeals improvidently reached and decided in this case. For that reason, in these unusual circumstances, the Court may wish to consider summarily reversing the judgment below, either on the basis of a conclusion by the Court that respondent does not have standing to invoke his father's rights, or on the authority of the judgment in *Miller*.[4] We emphasize, however, that the situation calls for some form of intervention by this

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[4] The majority and dissenting opinions below agreed that if respondent did not have standing to assert his father's rights, he could not prevail on his citizenship claim. See App., *infra*, 8a-9a, 15a.

Court. The court of appeals' invalidation of an Act of Congress, and its effective declaration that respondent is a citizen of the United States when Congress has not so provided, are matters of exceptional intrinsic importance. The court's decision on the merits conflicts directly with the decision of another court of appeals, as we explain below. See pp. 20-22, *infra*. And allowing the persistence of a situation in which the Executive Branch might be required to recognize United States citizenship in the Ninth Circuit on a basis different from that required by Act of Congress, and prevailing in other Circuits, would be both substantively unfair and unadministrable. See U.S. Const. Art. I, § 8, Cl. 4 (granting Congress power "To establish an *uniform* Rule of Naturalization * * * throughout the United States") (emphasis added).

2. The court of appeals also erred on the merits by striking down the requirements imposed on citizen fathers by Section 1409(a). As we argued at some length in our brief in *Miller* (which we have provided to respondent), see 96-1060 U.S. Br. 21-23, 31-43, those requirements are properly judged under the exceptionally deferential standard that this Court has traditionally applied in reviewing congressional enactments in the unique context of legislation governing matters of immigration and nationality. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 79-82 (1976); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711-713 (1893). Congress's power over the naturalization of aliens includes the power to determine whether, and under what conditions, to bestow citizenship upon persons born abroad. *Rogers* v. *Bellei*, 401

U.S. 815, 827 (1971); *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898). And the appropriate standard of review does not vary substantially simply because a particular statute affects the ability of citizens to transmit their citizenship, as well as the ability of foreign-born children to qualify for and perfect it. See *Fiallo*, 430 U.S. at 794-795 & n.6; *Mandel*, 408 U.S. 768; see 96-1060 U.S. Br. 37-39 & n.20, 42; cf. *Galvan*, 347 U.S. at 530-532.[5] Section 1409(a) concerns the legal consequences of events occurring in a foreign country, where one of the parents is an alien, and therefore in a context in which Congress historically has had great latitude.

The requirements imposed by Section 1409(a) reflect legitimate congressional concerns, not "gender classifications based on stereotypes." *Miller*, 523 U.S. at 452 (O'Connor, J., concurring in the judgment). The requirement that a child of a citizen father, born abroad out of wedlock to a non-citizen mother, be formally acknowledged or legitimated before being recognized as a citizen of the United States simply links the

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[5] *Miller* does not hold to the contrary. See 523 U.S. at 434 n.11 (opinion of Stevens, J.) ("[d]eference to the political branches dictates 'a narrow standard of review'" of statutes regulating citizenship by virtue of birth abroad, although the requirements imposed by Section 1409(a)(4) would satisfy even heightened scrutiny); *id.* at 451-452 (O'Connor, J., concurring in the judgment) (not addressing whether heightened scrutiny applies, but noting that the area is one "where Congress frequently must base its decisions on generalizations about groups of people"); *id.* at 452-453, 455-456 (Scalia, J., concurring in the judgment) (recognizing the "extremely limited" power of courts over matters of immigration and naturalization, and concluding that courts may not recognize citizenship other than as prescribed by Congress, "whether or not § 1409(a) passes 'heightened scrutiny' or any other test").

establishment of the formal status of being a citizen of the United States to the establishment of a formal and recognized parent-child relationship, equivalent to the formal legal relationship that is automatically established between the child and its mother by a legally documented birth. The requirement that a citizen father agree to support the child financially, within the limits of his means, during the child's minority helps to ensure that the solemn but non-judicial acknowledgment permitted by the statute will have the same consequence, in that important regard, as a more traditional determination of paternity, and again puts the father in the same position as a mother whose legal relationship with the child (and resulting support requirement) is otherwise established.

Both requirements thus help to ensure that the child will have some connection to this country that goes beyond mere biological descent, and will actually be in the same position, in that regard, as the child of a citizen mother born under otherwise similar circumstances. And the requirement that both conditions be fulfilled before the child reaches adulthood helps ensure that the child's ties to the United States will develop at the time when they are most likely to distinguish the child of a citizen from any other individual born abroad, that the father's commitment to the child is genuine and goes beyond bare acknowledgement, and that the child will not become a public charge. Taken together, the requirements imposed by Section 1409(a) are coherent, reasonable, and constitutional. See also 96-1060 U.S. Br. 14-43.

3. Finally, as Justice Scalia explained in *Miller*, 523 U.S. at 452-459 (Scalia, J., concurring in the judgment), even if the court of appeals had properly concluded that Section 1409(a)'s requirements were unconstitutional, it

should not have taken the further step of effectively declaring respondent to be a citizen of the United States. A court lacks the power to confer citizenship on a foreign-born individual in the absence of a statute that provides for citizenship, even as a remedy for a constitutional violation in the framing of the citizenship statute itself. *Ibid.*; *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988) (where Congress has set specific statutory limits on naturalization, "[n]either by application of the doctrine of estoppel, nor by invocation of equitable powers, nor by any other means does a court have the power to confer citizenship in violation of [those] limitations"); see also *Miller*, 523 U.S. at 445 n.26 (opinion of Stevens, J.) (noting but not reaching remedial issue); *id.* at 451 (opinion of O'Connor, J.) (citing Justice Scalia's opinion and acknowledging the "potential problems with fashioning a remedy"). Certainly that is true in this case, where any attempt to craft a remedy that would nullify some of the provisions of Section 1409(a), but still leave a statutory basis for declaring respondent to be a citizen, would involve "radical statutory surgery." *Id.* at 459 (Scalia, J., concurring in the judgment); see also 96-1060 U.S. Br. 43-49.

The court of appeals therefore should not have entertained respondent's claim to be a citizen, and in any event had no power to grant him the relief that it did. The court's determination to the contrary reflects an insupportable resolution of a question of general and exceptional importance, and independently warrants review by this Court.

4. On April 17, 2000, the Court of Appeals for the Fifth Circuit, relying on the lead opinion in *Miller*, sustained the constitutionality of Section 1409(a). *Nguyen* v. *INS*, 208 F.3d 528, 534-536 (2000). *Nguyen* involved

a child born in Vietnam in 1969. Nguyen's father, Alfred Boulais, who is a United States citizen, was not married to his mother, a Vietnamese national, who abandoned the child at birth. *Id.* at 530. The child was brought to the United States as a refugee in 1975, and was thereafter raised in this country by his father. Boulais did not comply with the requirements of Section 1409(a), and Nguyen accordingly never became a citizen of the United States. *Id.* at 530, 536.

In 1992 Nguyen pleaded guilty to two state felony charges of sexual assault on a child, and in 1995 the INS began deportation proceedings against him. An immigration judge found that he was deportable. Nguyen appealed to the Board of Immigration Appeals (BIA), which affirmed the order of deportation. In 1998 Boulais obtained a DNA test establishing that he was Nguyen's biological father, and an "Order of Parentage" from a Texas court. Nguyen and Boulais then jointly instituted litigation in district court, seeking relief from deportation and a declaratory judgment of citizenship. Boulais also sought to join in his son's petition to the court of appeals seeking review of the BIA's decision affirming the order of deportation. *Nguyen*, 208 F.3d at 530-532, 534.

The court of appeals held that Boulais was, under the circumstances, a proper party to the case before it challenging the deportation order, and should be permitted to represent his own interests in that action. 208 F.3d at 533-534. On the merits, the court held that the conditions on the grant of citizenship imposed by Section 1409(a) are constitutional; that Boulais failed to comply with those conditions; and that Nguyen is therefore not a citizen of the United States. *Id.* at 534-536. That decision conflicts squarely with the Ninth Circuit's

decision in this case—of which the Fifth Circuit was fully aware. See *Nguyen*, 208 F.3d at 533-534.

The conflict between the courts of appeals heightens the importance of the constitutional and remedial questions presented in this case.[6] It requires intervention by this Court, both to give uniform guidance to those responsible for administering the citizenship laws, and to ensure equality of treatment for all those who seek citizenship by descent from an unmarried citizen parent, regardless of the judicial circuit in which they reside or apply. Should this Court choose to reverse the decision below summarily, see p. 16, *supra*, the circuit conflict will of course be eliminated, and there will be no pressing need for review on the merits. Under any other circumstances, however, the Court should grant plenary review of the decision below.

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[6] The same questions are also presented in *Lake* v. *Reno*, which was argued on March 31, 2000, before the Court of Appeals for the Second Circuit, and remains pending in that court (No. 99-4125).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the court of appeals.

Respectfully submitted.

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MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 96-30065

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO AHUMADA-AGUILAR,
A/K/A RICARDO AHUMADA;
A/K/A RICARDO ALFONSO HERNANDEZ,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington
D.C. No. CR-95-00339-1-TSZ

[Argued and Submitted: Aug. 5, 1996
Memorandum Decided: Sept. 19, 1997
Withdrawn: Oct. 2, 1998
Decided: Sept. 2, 1999]

ORDER

Before: SCHROEDER, ALARCON, and KLEINFELD, Circuit Judges.

Opinion by Judge SCHROEDER; Dissent by Judge KLEINFELD.

SCHROEDER, Circuit Judge:

The panel as constituted above has voted to grant the petition for rehearing and the attached opinion is ordered filed.

OPINION

Ricardo Ahumada-Aguilar appeals his conviction on two counts of illegal reentry by an alien with prior felony convictions, 8 U.S.C. § 1326(a) and (b)(1). Ahumada-Aguilar argues that he is not an alien because his father was a United States citizen at the time of Ahumada-Aguilar's birth in Mexico to a Mexican citizen mother. The controlling statute provides that in the case of a child born "out of wedlock" whose father is a U.S. citizen and mother is an alien, the child to establish citizenship must show that the putative father has agreed to provide financial support to the child, and has acknowledged paternity or that paternity has been legally declared. *See* 8 U.S.C. § 1409(a)(3) and (4). There are no such requirements where the child is born to a U.S. citizen mother and alien father. *See id.* § 1409(c). Because Ahumada-Aguilar failed to satisfy the provisions of § 1409(a)(3) and (a)(4), the district court concluded that Ahumada-Aguilar is not a U.S. citizen. He contends that he is entitled to citizenship because § 1409(a)(3) and (a)(4) are unconstitutional as violative of his now deceased father's equal protection rights. We agree because a majority of the U.S. Supreme Court has effectively so declared. *See Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L.Ed.2d 575 (1998).

A panel consisting of Judges Alarcon, Norris, and Kleinfeld initially filed an unpublished disposition in this case affirming the district court on September 19, 1997. Following a petition for rehearing, the panel withdrew submission of the case to await the Supreme Court's decision in *Miller*. In the meantime, Judge Norris retired from the court, and Judge Schroeder was drawn to take his place on the panel. Having now considered the separate opinions in *Miller*, we reverse Ahumada-Aguilar's conviction. Because we resolve Ahumada-Aguilar's equal protection claim in his favor, we need not reach the other issues he raises on appeal.

FACTS

According to her affidavit that is not contested, Ahumada-Aguilar's mother, Genoveva Hernandez, met Frederick J. Deutenberg in a restaurant in Nogales, Mexico in late December 1970. At that time, she was 19 years old and a citizen of Mexico. Deutenberg was 50 years old and a citizen of the United States of America. Hernandez and Deutenberg traveled throughout the United States from January to June 1971.

Sometime during the spring of 1971, Hernandez became pregnant. Deutenberg was the only person with whom she had sexual relations in 1971. When she told him that she was pregnant, Deutenberg became angry. Hernandez told Deutenberg that she could not continue to travel from place to place and that she would run away when she had the opportunity. Sometime thereafter, he gave Hernandez a small suitcase and $75.00 to purchase a ticket to Mexico.

Hernandez returned to Mexico late that summer. Ahumada-Aguilar was born on December 22, 1971 in Guadalajara, Mexico. In late 1972 or 1973, Hernandez went to the American consulate in Guadalajara to seek help in locating Deutenberg, but did not receive any assistance in her search. Hernandez entered the United States in 1976 accompanied by Ahumada-Aguilar. She continued in her attempts to find Ahumada-Aguilar's father by scanning phone books to see if she could locate Deutenberg. She was unsuccessful.

In 1985, Hernandez married a United States citizen and gained legal residency. She assisted Ahumada-Aguilar in obtaining a permanent resident alien registration card when he was 13 years old, based on her legal immigration status. Hernandez made a further attempt to locate Deutenberg by contacting the FBI. She was advised the FBI could not help her without a court order.

On July 15, 1987, Hernandez applied for public assistance funds. She listed "Frederick Duttenberg" [sic] as Ahumada-Aguilar's father. She also agreed to assist the welfare department in identifying Deutenberg and establishing paternity in order to force him to accept financial responsibility for his son. Hernandez and her son did not locate Deutenberg, but eventually learned he had died on April 17, 1994. They obtained a copy of his death certificate that is in this record, as is a copy of the certificate of his birth in Philadelphia.

On December 6, 1990, Ahumada-Aguilar was convicted in a state court in Tulare County, California of the crime of possession of cocaine, a felony. On October

10, 1991, while he was in custody for a traffic offense in Mount Vernon, Washington, Ahumada-Aguilar was interrogated by Darryl Essing, a United States Border Patrol Agent. Agent Essing prepared and served an order to show cause ("OSC") on Ahumada-Aguilar. The OSC required Ahumada-Aguilar to demonstrate why he should not be deported as the result of his prior conviction for possession of cocaine.

On November 18, 1991, Ahumada-Aguilar appeared at his deportation hearing. He admitted that he had been convicted of possession of cocaine. The immigration judge ordered that he be deported. He was deported two days later. Ahumada-Aguilar returned to the United States without the prior approval of the Attorney General. He was again deported on or about December 9, 1994. Following that date, Ahumada-Aguilar again reentered the United States without the permission of the Attorney General.

On June 7, 1995, Ahumada-Aguilar was indicted on two counts of illegally entering the United States after deportation as a convicted felon in violation of 8 U.S.C. § 1326(a) and (b)(1).[1] Ahumada-Aguilar filed a motion to dismiss the indictment, arguing that he was not subject to deportation because he is a United States citizen pursuant to 8 U.S.C. § 1401(g) and § 1409(a). Ahumada-Aguilar asserted that 8 U.S.C. § 1409(a) denies the equal protection rights of a U.S. citizen

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[1] Section 1326 provides in pertinent part that "any *alien* . . . whose deportation was subsequent to a conviction for commission of . . . a felony (other than an aggravated felony) . . . shall be fined under title 18, imprisoned not more than 10 years, or both." (emphasis added).

father, who faces more hurdles than a mother in passing U.S. citizenship to children.

The district court denied the motion. The district court held that Ahumada-Aguilar's equal protection argument was foreclosed by this court's 1995 decision in *Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995). The prosecutor then moved in limine to bar the defense from presenting evidence to the jury that Ahumada-Aguilar is a U.S. citizen to rebut the Government's evidence that he was an alien when he was deported. The court requested the defense to make an offer of proof regarding whether Ahumada-Aguilar met the evidentiary requirements of § 1409(a).

Based on this offer of proof, which included the mother's affidavit, the district court granted the Government's motion to preclude Ahumada-Aguilar from offering any evidence at trial to support his affirmative defense that he was a U.S. citizen and not an alien. The court found that Deutenberg was a U.S. citizen at the time Ahumada-Aguilar was born and that Deutenberg was Ahumada-Aguilar's biological father. Thus, the court concluded that Ahumada-Aguilar satisfied the requirements of § 1409(a)(1) and (a)(2).

The court ruled, however, that the citizenship defense could not be presented because Ahumada-Aguilar could not produce evidence that Deutenberg had agreed in writing to provide financial support for Ahumada-Aguilar until he reached the age of 18, as required by § 1409(a)(3). The court also found that Ahumada-Aguilar had failed to offer any proof to fulfill § 1409(a)(4) that (1) Ahumada-Aguilar had been legitimated under the law of his residence or domicile, (2) his

U.S. citizen father had acknowledged paternity in writing under oath, or (3) a competent court had ruled that Deutenberg was Ahumada-Aguilar's father. After a bench trial based on stipulated facts, the district court found Ahumada-Aguilar guilty on both counts alleged in the indictment.

DISCUSSION

"The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Runnett v. Shultz*, 901 F.2d 782, 783 (9th Cir. 1990). A child born out of wedlock to a U.S. citizen father and an alien mother is subject to 8 U.S.C. § 1409(a). This section provides:

> The provisions of paragraphs (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if—
>
> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth,
>
> (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and
>
> (4) while the person is under the age of 18 years—

> (A) the person is legitimated under the law of the person's residence or domicile,
>
> (B) the father acknowledges paternity of the person in writing under oath, or
>
> (C) the paternity of the person is established by adjudication of a competent court.

8 U.S.C. § 1409(a).[2] When a child is born abroad to a U.S. citizen mother, however, § 1409(c) applies and citizenship is conferred to the child so long as the mother has had at least one year of continuous residence in the United States. *See* 8 U.S.C. § 1409(c). Ahumada-Aguilar argues on appeal, as he did in the district court, that the additional requirements of § 1409(a) for children born out-of-wedlock where the father is a U.S. citizen constitutes a denial of equal protection under the Fifth Amendment for the citizen father.

A. Ninth Circuit Law Before *Miller v. Albright*

Before the Supreme Court's decision in *Miller*, Ahumada-Aguilar's challenge would have failed under this court's case law, whether he was asserting his own

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[2] If a person satisfies § 1409(a)'s requirements, then § 1401(g) applies to that person. Section 1401(g) provides in pertinent part:

> The following shall be nationals and citizens of the United States at birth: a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years. . . .

rights or those of his father. When presented with a child's claim that she was denied equal protection, this court held in 1995 that additional proof provisions, like those contained in § 1409(a), are constitutional as applied to illegitimate children seeking citizenship through the citizenship of the parent. *See Ablang v. Reno*, 52 F.3d 801, 804 (9th Cir. 1995). In *Ablang*, we considered a statute similar to § 1409 that placed additional requirements for citizenship on a child born abroad to a U.S. citizen father. Employing a rational basis review, *Ablang* concluded that the government had legitimate reasons for requiring proof of paternity and found that the statute did not violate equal protection principles. Because there was no gender-based distinction among classes of children, as opposed to parents, there was no reason to apply heightened scrutiny. *See id.* Moreover, even though Ablang argued that the statute's distinction between legitimate and illegitimate children required heightened scrutiny, we held that rational basis review applied in the immigration context. *See id.* at 804-05, *citing Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977).

Also prior to *Miller v. Albright*, we held in *Wauchope v. United States Department of State*, 985 F.2d 1407 (9th Cir. 1993) that it would be inappropriate to apply heightened scrutiny to a parent's equal protection claim as well. Appellants in *Wauchope* challenged a statute that placed additional requirements for citizenship on children born abroad to U.S. citizen mothers. Like Ahumada-Aguilar, but unlike Ablang, Wauchope's mother was deceased and thus unable to assert her own

equal protection rights.[3] We held that Wauchope had third-party standing to challenge the statute on the grounds that it discriminated against her mother on the basis of gender. *Id.* at 1411. A statute that discriminates on the basis of gender typically is subjected to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 532-33, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Nevertheless, we concluded in *Wauchope* that when reviewing an immigration statute, the Supreme Court's decision in *Fiallo* provided the appropriate standard: "a facially legitimate and bona fide reason," or in equal protection terms, rational basis review. *Wauchope*, 985 F.2d at 1413-14.

B. The Supreme Court's Decision in *Miller v. Albright*

Considering Ahumada-Aguilar's challenge in light of the Supreme Court's decision in *Miller*, we now conclude that heightened scrutiny is appropriate and that § 1409(a)(3) and (a)(4) do not withstand it. In *Miller*, a child born out-of-wedlock to a U.S. citizen father and alien mother challenged § 1409(a)(3)'s demand for proof of financial support by the father and § 1409(a)(4)'s requirement that paternity be legitimated before the child reaches the age of 18. Initially, the child's father, Charlie Miller, filed suit to assert his own rights, but his claim was subsequently dismissed by the district court. Thus, the child, Lorelyn Miller, was the only petitioner before the Supreme Court, seeking to assert a violation of her father's rights. The Court upheld the constitutionality of § 1409(a)(4) in a plurality

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[3] The *Ablang* court distinguished *Wauchope* on the basis that "Ablang has standing only to proceed on her own behalf, as her father is still alive." *Ablang*, 52 F.3d at 804 n. 4.

opinion that was one of multiple separate opinions. In the plurality opinion, Justice Stevens and Chief Justice Rehnquist did not clearly decide which standard was appropriate, but they nevertheless concluded that § 1409(a)(4) survived heightened scrutiny. *Miller*, 118 S. Ct. at 1437 n. 11. They also explained that they had no need to reach the question of whether § 1409(a)(3) is unconstitutional. Justices Scalia and Thomas concurred on the basis that the Court had no power to confer citizenship. Three Justices dissented on the ground that the statute violated equal protection. Justice Breyer's dissent, joined by Justices Souter and Ginsburg, explained that Lorelyn Miller had third-party standing to press her father's claim, that heightened scrutiny was required, and that § 1409(a)(3) and (a)(4) do not pass muster. *Id.* at 1456, 1457-58 (Breyer, J., dissenting). Two Justices (Justices O'Connor and Kennedy) concurred in the result of the plurality opinion. According to their concurrence, the statute violated only the equal protection rights of the claimant's parent, but the claimant lacked standing to vindicate those rights while the parent lived. We focus on Justice O'Connor's and Kennedy's concurrence to aid in our disposition of Ahumada-Aguilar's case. They found that Miller did not satisfy the third prong of the three-part test for determining third-party standing established in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991): "The litigant must have suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411, 111 S. Ct. 1364.

Justice O'Connor observed that "[w]hile it seems clear that petitioner has a significant stake in challenging the statute and a close relationship with her father, she has not demonstrated a substantial hindrance to her father's ability to assert his own rights." *Miller*, 118 S. Ct. at 1443 (O'Connor, J., concurring). Miller's father was alive and had even initially filed his own suit. Justice O'Connor observed that third-party standing has been permitted only when more "'daunting' barriers deterred the rightholder," such as when the rightholder is deceased. *Id.* at 1444, *citing Hodel v. Irving*, 481 U.S. 704, 711-12, 107 S. Ct. 2076, 95 L.Ed.2d 668 (1987).

Thus it is significant for our case that in the view of two Justices, had Miller's father been deceased, Miller would have demonstrated third-party standing and they would have held § 1409(a) unconstitutional. Justice Breyer in his dissent noted Justice O'Connor's (and Kennedy's) opinion and offered the following observation:

> [L]ike Justice O'Connor, I "do not share," and thus I believe a Court majority does not share, "Justice Stevens' assessment that the provision withstands heightened scrutiny." I also agree with Justice O'Connor that "[i]t is unlikely" that "gender classifications based on stereotypes can survive heightened scrutiny," a view shared by at least five members of this Court.

Id. at 1457-58 (Breyer, J., dissenting). Therefore, had the facts in *Miller* been like those in this case, a majority of the Court would have found § 1409(a)(4) unconstitutional by applying heightened scrutiny.

Our decision in *United States v. Viramontes-Alvarado*, 149 F.3d 912 (9th Cir. 1998) is not to the contrary. In that case, the defendant attempted to assert an equal protection claim on behalf of his father, contending that the California law on legitimation treats U.S. fathers differently from U.S. mothers. *Id.* at 916 n. 2. As in *Miller*, Viramontes-Alvarado's father was alive and, in fact, testified on behalf of his son at trial. *Id.* at 915. Accordingly, we noted that Viramontes-Alvarado's claim was rejected by the Supreme Court in *Miller*.

There remains a question as to whether *Miller* also compels the conclusion that § 1409(a)(3) is unconstitutional. The Justices disagreed whether they were required to review only § 1409(a)(4) or both § 1409(a)(3) and (a)(4). *Compare Miller*, 118 S. Ct. at 1436 (Stevens, J.) *with id.* at 1456 (Breyer, J. dissenting). Justice O'Connor did not distinguish between the provisions, but explained that it is "unlikely" that "any gender classifications based on stereotypes can survive heightened scrutiny." *Id.* at 1445-46 (O'Connor, J., concurring).

We see no reason to distinguish between the provisions in this case. Both rely on outdated stereotypes. *See J.E.B. v. Alabama*, 511 U.S. 127, 127, 114 S. Ct. 1419, 128 L.Ed.2d 89 (1994) (noting that gender-based discrimination is often reflective of outmoded generalizations about gender). Section 1409(a)(3) relies on the generalization that mothers are more likely to have close ties to and care for their children than are fathers. By requiring a U.S. citizen father to agree in writing that he will provide financial support to the child until the child reaches the age of 18, (a)(3) presumes that a

father will not care for and support his child unless required to do so.

The evidence in the record sufficiently demonstrates that Ahumada-Aguilar is the child of a U.S. citizen father, satisfying the requirements of § 1409(a)(1) and (a)(2). Therefore, the judgment of conviction is reversed and the case remanded with instructions to vacate the conviction.

REVERSED AND REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I dissent. The Supreme Court decided the same issue in *Miller v. Albright*[1] a year ago. Yet today we follow the dissent. And we do so in the face of both pre-*Miller*[2] and post-*Miller*[3] Ninth Circuit decisions going the other way. The majority develops a novel interpretation of *Miller*. But if it were correct, *Miller* would have gone the other way.

The statute discriminates among illegitimate children according to the sex of the citizen parent. A citizen mother's child gets citizenship nearly automatically, but a citizen father's child must meet additional

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[1] *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L.Ed.2d 575 (1998).

[2] *See Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995), *cert. denied* 516 U.S. 1043, 116 S. Ct. 701, 133 L.Ed.2d 658 (1996).

[3] *See United States v. Viramontes-Alvarado*, 149 F.3d 912 (9th Cir. 1998), *cert. denied* — U.S. ——, 119 S. Ct. 434, 142 L.Ed.2d 354 (1998).

requirements.[4] It does not matter what sex the child is, just what sex the unmarried citizen parent is.

For many years, lawyers representing children born of such unions, where the father was the non-citizen, have asserted claims that the sex distinction drawn by the statute is unconstitutional under the Equal Protection Clause. The claims were colorable until a solid wall of authority arose rejecting them. We held in *Ablang v. Reno*[5] that the sex distinction was not unconstitutional. Then we held in this case, following *Ablang*, that it was not.[6] We withdrew our disposition because the Supreme Court was about to rule on the question. It rejected the constitutional challenge by a child of a citizen father in *Miller v. Albright*.[7] Then we considered the matter, subsequent to *Miller*, in *Viramontes-Alvarado*.[8] We held that under *Miller*, the statute was not unconstitutional. Yet today, we hold that it is. That is a surprising approach to precedent.

In *Miller v. Albright*, the Supreme Court decision, the litigant was in the same position as Ahumada-Aguilar in all relevant respects (the illegitimate child of a citizen father and non-citizen mother). The litigant made the same Equal Protection argument. And in *Miller*, the child lost the case.

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[4] *See* 8 U.S.C. § 1409.

[5] *Ablang*, 52 F.3d 801 (9th Cir. 1995).

[6] *See United States v. Ahumada-Aguilar*, 124 F.3d 213 (9th Cir. 1997), *unpublished disposition, withdrawn.*

[7] *Miller*, 523 U.S. 420, 118 S. Ct. 1428, 140 L.Ed.2d 575 (1998).

[8] *Viramontes-Alvarado*, 149 F.3d 912 (9th Cir. 1998).

Figuring out what *Miller* means is not as complicated as the majority suggests. True, *Miller* is written in the old English appellate style, with most of the justices writing their own reasons for the decision, instead of a majority agreeing on one rationale. But the facts are simple enough: the child was of a non-citizen mother and citizen father who were not married. And it is simple enough to count to six. Six is the number of justices who agreed that the child loses on the citizenship claim based on the Equal Protection Clause.

In *Miller*, the Supreme Court granted certiorari to answer the question:

> Is the distinction in 8 U.S.C. § 1409 between "illegitimate" children of United States citizen mothers and "illegitimate" citizen fathers a violation of the Fifth Amendment to the United States Constitution?[9]

The Supreme Court's answer was no. We are therefore obligated to give the same answer.

Were the count to six disputable, the dispute would be ended by our own post-*Miller* reading of *Miller*. Addressing the same Equal Protection Clause argument, we held in *Viramontes-Alvarado*[10] that, "this argument has been rejected by the Supreme Court in *Miller v. Albright*."[11] I do not think there is any room whatsoever, regardless of how impressed we may be with the force of the Equal Protection claim, for us to accept it. We are bound by precedent of our court, the

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[9] *Miller*, 118 S. Ct. at 1434 (internal quotations omitted).

[10] *Viramontes-Alvarado*, 149 F.3d 912 (9th Cir. 1998).

[11] *Id.* at 916, n. 2.

Supreme Court, and our court construing the Supreme Court decision, to reject it.

In *Miller*, Justice Stevens, joined by Chief Justice Rehnquist, said the distinction drawn by the statute between citizen fathers and citizen mothers was neither arbitrary nor invidious, and did not violate the Equal Protection Clause. Justice O'Connor, joined by Justice Kennedy, concurred in the judgment, on the ground that because the sex difference was in treatment of fathers and mothers, not male and female children, the child did not have standing to raise the father's Equal Protection claim. Justice Scalia, joined by Justice Thomas, concurring in the judgment, said that the Court could not reach the Equal Protection issue, because it lacked power to grant citizenship to an alien in any event, and could do nothing but strike the whole law and deny relief if it found the distinction to be unconstitutional. Justices Ginsburg, Souter and Breyer dissented. That amounts to six justices agreeing that the child raising the challenge must lose. It leaves no room for us to hold, as the majority does today, that the child wins.

The majority's theory today is that because Ahumada-Aguilar's father is dead, Ahumada-Aguilar has standing to assert his father's claim that he is being discriminated against because of his sex. Even if that distinction made a difference it would be weak in this case. When Ahumada-Aguilar's deportation hearing was held, his father was still alive. So even the thread today's majority tugs, that Justice O'Connor said in *Miller* that the child "has not demonstrated a substantial hindrance to her father's ability to assert his

own rights,"[12] does not distinguish the cases. And it is only a thread. The Supreme Court has not held that if the parent is dead, then the child can assert the parent's right not to be discriminated against on account of sex.

I doubt that there can be standing for purposes of Article III where a child purports to litigate the father's sex discrimination claim, in the absence of unusual circumstances showing that the father did all he could to assert it for himself. The father's interest may be adverse to the child's, so the child is asserting only his own interest and not his father's. Four justices in the majority thought the child had to lose whether she had standing or not. Justice O'Connor and Justice Kennedy, the only two justices in the majority even to reach standing, concluded that the child did not have standing. Because the distinction by sex was drawn by Congress between the parents, not between male and female children, the children cannot establish a case or controversy, and a court lacks jurisdiction under Article III, section 1 of the Constitution, to hold in the child's case that the statute discriminated unconstitutionally against one of the parents by sex.

The law established by *Miller* is that a child of an alien mother and citizen father is not entitled to constitutional relief from the statutory requirements on account of the sex difference in the way the statute treats such a child as compared with the child of an alien father and citizen mother. Whether because the sex distinction is not arbitrary or invidious, as two justices think, or because the child lacks standing to

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[12] *Miller*, 118 S. Ct. at 1443.

challenge any invidiousness or arbitrariness, as two other justices think, or because such a child could not obtain a judicial remedy even if the child had standing and the statute denied Equal Protection, as two other justices think, the consequence is the same: the Supreme Court has held that the child obtains no remedy. So must we, under the one Supreme Court clause.[13]

Wauchope,[14] even if it had any force sufficient to overcome a Supreme Court decision and a subsequent Ninth Circuit decision interpreting the Supreme Court decision (of course it does not, and must be treated as overruled to the extent that it may be inconsistent with *Miller*), would be distinguishable. It says that children can assert their dead mothers' constitutional claims where "their interests coincide with those of their mothers and are equally as intense."[15] How do we know that Ahumada-Aguilar's father had the same interest as Ahumada-Aguilar, held with equal intensity, that Ahumada-Aguilar should be a United States citizen? The only fact in the record bearing on the father's interest was that he sent the mother packing. His financial interest was better served by not supporting his son than by supporting him. There is no particular reason to think that, were the father alive now (he was when Ahumada-Aguilar's deportation hearing was held, and did nothing about it) he would say, "I intensely want my long lost son to be a United States citizen."

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[13] U.S. Const. Art. III, § 1.

[14] *Wauchope v. United States Dept. of State*, 985 F.2d 1407 (9th Cir. 1993).

[15] *Wauchope*, 985 F.2d at 1411.

The majority holds that the statute Congress passed is unconstitutional because it falls into the class of laws that "rely on outdated stereotypes." According to the majority, the statute "relies on the generalization that mothers are more likely to have close ties to and care for their children than are fathers." Though the same zeitgeist floats in my air as in the majority's, I cannot find the "stereotypes" clause in my copy of the Constitution. Probably some members of Congress had the thoughts today's majority attributes to them, but they still had constitutional authority to make laws. Probably some thought that it is a lot easier to be sure of maternity than paternity. Though the uncertainty can now be eliminated by DNA tests, the expense and infrequency of testing still provides a rational basis for a distinction. And probably some did not much care about the stereotype the majority attributes to them. This statute was passed during the Korean War. Members of Congress knew that American soldiers who went abroad to fight wars, and caused children to be conceived while they were abroad, were overwhelmingly male, because only males were drafted, so that the number of children born illegitimately of male citizens might be large enough to affect immigration policy, while the number of illegitimate children of female citizens would be negligible. They may also have sought to minimize the administrative burden on the Department of Defense for paternity and citizenship claims respectively by the women the soldiers left behind and their children. This may not be pretty, but it is a rational basis for the sex distinction. Congress had plenary power over immigration empowering it to make such distinctions.

There is no particular barrier to the father's Equal Protection claim being raised, if some father wants to raise it. Some noncustodial fathers of children born out of wedlock do not care to pay child support if it can be avoided. A father might want his illegitimate child to have United States citizenship, yet not want to pay child support as required by the statute at issue. Such a father could challenge the statute. We lack the power under the Constitution to reach out to hold an act of Congress unconstitutional when the person challenging it is not in the class of persons against whom the arguably unconstitutional distinction is made.

As two justices said in *Miller*, Congress had a rational purpose for the law. And as two more said, it would not matter if they did not have a rational purpose, because courts cannot confer citizenship, whether the statute not conferring it is constitutional or not. And as two more said, it would not matter if Congress lacked a rational purpose and courts could confer citizenship, because the child lacks standing to assert that the father was discriminated against by sex. And as we held in *Viramontes-Alvarado*, the Supreme Court has held in *Miller* that the child loses this claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-30065

D.C. No.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO AHUMADA-AGUILAR,
A/K/A RICARDO AHUMADA;
A/K/A RICARDO ALFONSO HERNANDEZ,
DEFENDANT-APPELLANT

[Filed: Oct. 2, 1998]

ORDER WITHDRAWING MEMORANDUM DISPOSITION AND DISSENT FILED 9/19/97

Before: SCHROEDER, ALARCÓN, and KLEINFELD, Circuit Judges.

The memorandum disposition and dissent filed in the above case on September 19, 1997, is withdrawn. An opinion shall be filed at a later date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-30065

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO AHUMADA-AGUILAR,
A/K/A RICARDO AHUMADA;
A/K/A RICARDO ALFONSO HERNANDEZ,
DEFENDANT-APPELLANT

[Filed: Nov. 13, 1997]

ORDER

Before: ALARCÓN, and KLEINFELD, Circuit Judges.

Issuance of the mandate in this case is stayed, pending the decision of the United States Supreme Court in *Miller v. Christopher*, 96 F.3d 1467 (D.C. Cir.), *cert. granted, Miller v. Albright*, 117 S. Ct. 1551, *cert. limited*, 117 S. Ct. 1689 (1997). The parties are directed to file simultaneous briefs not exceeding 10 pages addressing the effect of *Miller v. Christopher* within 30 days of when that decision comes down.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-30065
D.C. No. CR-95-00339-1-TSZ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO AHUMADA-AGUILAR,
A/K/A RICARDO AHUMADA;
A/K/A RICARDO ALFONSO HERNANDEZ,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted August 5, 1996,
Seattle, Washington

[Filed: Sept. 19, 1997]

MEMORANDUM*

Before: ALARCÓN, NORRIS and KLEINFELD,
Circuit Judges.

We are required to reject appellant's equal protection argument, because *Ablang v. Reno*, 52 F.3d 801, 804

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

(9th Cir. 1995) controls. Because Congress has plenary authority to prescribe rules for the admission and exclusion of aliens, the scope of judicial inquiry is especially limited, even more than in the usual equal protection case, by the "facially legitimate and bona fide reason" standard. *Wauchope v. Dep't of State*, 985 F.2d 1407, 1413 (9th Cir. 1993). It would be inappropriate to distinguish *Ablang*, because one of the reasons mentioned in *Fiallo v. Bell*, 430 U.S. 787, 798-99 (1977), "perceived absence in most cases of close family ties," applies even where paternity is established, as does the reason we mentioned in *Ablang*, "a desire to promote early ties to this country and to those relatives who are citizens of this country," 52 F.3d at 806.

Appellant has not established the elements for an equitable estoppel, because he has not shown "affirmative misconduct going beyond mere negligence." *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989) (en banc). Negligent loss of photographs does not amount to affirmative misconduct in the circumstances of this case.

Appellant has not established unconstitutionality of his initial deportation. He had been given a form explaining that he could be represented by an attorney or other authorized individual, and would be given a list of attorneys and others available to represent aliens, some for free or for a nominal fee. He was fully advised of all that he was entitled to be advised of by 8 C.F.R. § 242.16(a). The form he received was in Spanish and English. Appellant said that it did not matter to him whether the proceeding were in Spanish or English, indicating that he understood both.

The regulation regarding right to counsel says that the immigration judge must require the alien "to state then and there whether he desires representation." 8 C.F.R. § 242.16(a). The immigration judge said to the several persons before him, "if you want to proceed right now and speak for yourselves, proceed with your case now, I want you to stand up and raise your right hand." This sufficed to require appellant to "state then and there whether he desires representation." The statement would be made by physical movement, standing up and raising his hand if he did not want representation, and sitting and doing nothing if he did. The affirmative act of standing and raising one's hand suffices to distinguish one statement from the other with clarity. Individuals voting in legislative bodies sometimes state their vote by raising of hands or standing up. The physical movement is a plain and express statement. By standing up and raising his hand, appellant plainly demonstrated his intent to waive counsel. Appellant, in his individual colloquy with the immigration judge, said "I just want to get it over with." That is consistent with his waiver of counsel and explains it.

The district judge did not err in his ruling that no instruction on citizenship should be given. The defense conceded that it had no evidence to show that appellant satisfied 8 U.S.C. § 1409(a) (3) and (4). Appellant was indicted under 8 U.S.C. § 1326(a) and (b) (1), so this issue turns on which side had the burden of proof with respect to those elements of § 1409. Of course the government had the burden of proving all elements of the crime beyond a reasonable doubt. But the elements of the legitimation statute, § 1409, are not the same as the elements of the reentry of removed alien statute,

§ 1326. In view of defendant's conceded inability to establish legitimation, the trial judge was within his discretion in excluding evidence of some but not all the elements of legitimation and not instructing on legitimation.

AFFIRMED.

NORRIS, J., dissenting:

Appellant was born in Mexico to a Mexican citizen mother and an estranged United States citizen father, who never legitimated him. He and his mother came to the United States in 1976, when he was four years old, and they obtained legal residency in 1985. Ahumada-Aguilar lived in the United States continuously until 1991, when he was deported based on a conviction for possession of cocaine at the age of 18. After that deportation, he has returned to the United States and has now been convicted for illegal reentry as a felon.

In this appeal from that conviction, appellant argues principally that his father's United States citizenship should have qualified him for derivative citizenship as well. Alternatively, he argues that 8 U.S.C. § 1409(a) and (c), which govern his potential for nationalization, violate the Equal Protection clause by discriminating on the basis of legitimacy status at birth and on the basis of sex. In addition, appellant argues that the district court erred when it rejected his equitable estoppel argument and when it refused to allow him to argue his derivative citizenship claim to a jury without

supporting evidence. Finally, he collaterally attacks his original deportation hearing on due process grounds.

I dissent because I agree with appellant that his underlying deportation hearing violated due process.

First, appellant complains that he was denied due process because the IJ did not obtain a knowing, voluntary, and intelligent waiver of his statutory right to counsel, pursuant to 8 U.S.C. § 1362. I agree. There is no reason to believe the waiver was intelligent. Although the IJ informed appellant that he could be represented by counsel at the deportation hearing, the IJ did not explain to him why counsel might be desirable or even that immigration law is complicated.[1] Our court has recognized that "[a] lawyer is often the only person who could thread the labyrinth" of deportation law, and that "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" *Castro-O'Ryan v. Dep't of Immigration & Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting E. Hull, *Without Justice for All* 107 (1985)). Given this complexity of immigration law, the IJ

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[1] The entire discussion of the right to counsel was as follows: the IJ advised the four respondents at the deportation hearing that they each had the right to representation by counsel but that "[t]hose of you who want to proceed right now and speak for yourselves [should] please stand up." CR at 143. After one of the respondents asked for clarification of what the IJ meant, the IJ answered: "I have told you that if you want more time to get a lawyer I will give you more time. . . . But if you want to proceed right now and speak for yourselves, proceed with your case right now, I want you to stand up and raise your right hand." CR at 144. All four respondents, including appellant, stood. CR at 145.

should at least have explained the dangers of self-representation. Absent such an explanation, only the most extraordinary alien would know what it means to decline assistance from counsel trained in the intricacies of the relevant law.[2] I believe, therefore, that appellant did not validly waive his right to counsel because the IJ failed to advise him of the dangers of self-representation.

In addition, appellant argues that the IJ did not elicit a valid waiver of his right to appeal the deportation decision. Again, I agree. At the close of the deportation hearing, the IJ told appellant that he could appeal the deportation decision or accept it as final; appellant accepted the decision as final. He was not given the option to reserve the decision whether to appeal. CR at 150-51. I would hold that the procedure at issue here did not elicit a valid waiver of appellant's right to appeal the deportation decision.

I next consider the issue of prejudice, which is not seriously in dispute here.[3] Denial of counsel alone

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[2] Contrary to the government's argument, the bare fact that appellant received assistance from an attorney in a prior criminal action would neither have apprised him of the dangers of proceeding without counsel generally nor have demonstrated for him the intricacies of immigration law.

[3] Although the United States conceded in the district court that appellant was prejudiced by not having an attorney at his deportation hearing, CR at 67, the United States now argues that appellant "should not be entitled to evade the requirements of 8 U.S.C. § 1182(c) by filing a frivolous appeal." Appellee's Brief at 21. But appellant's appeal would not have been frivolous. At the least, appellant could have raised in his appeal the substantial question whether he intelligently waived his right to counsel.

prejudices a defendant if counsel could have presented the defendant's case in a more advantageous manner. *Colindres-Aguilar v. INS*, 819 F.2d 259, 262 (9th Cir. 1987). The United States conceded at trial that an attorney could in fact have presented Ahumada-Aguilar's case more advantageously: "if [Ahumada-Aguilar] would have had a lawyer, they unquestionably would have been able to keep this issue alive long enough to get it into the back door on this [discretionary] relief and then raise whatever issues they thought they could raise." CR at 67. And the district court noted that "a competent lawyer would have raised this issue [of discretionary relief from deportation]," which would have rendered appellant's chance for obtaining relief from deportation "substantial." CR at 51, 78. These observations about what competent counsel would have done are alone sufficient to demonstrate that appellant was prejudiced by the IJ's failure to elicit a valid waiver of his right to counsel.

In addition, appellant makes the related showing that the invalid waiver of his right to appeal prejudiced him because he could have benefitted from an appeal even without counsel. The district court found, and the government conceded, that if appellant had appealed the IJ's decision to deport him, he would have become eligible for discretionary relief from deportation pursuant to 8 U.S.C. § 1182(c).[4] CR at 67, 78. *See United*

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[4] 8 U.S.C. § 1182(c) provides in pertinent part:

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the

States v. Jimenez-Marmolejo, 104 F.3d 1083, 1085 (9th Cir. 1996) (aliens continue to accrue time toward statutory minimum residence requirement during pendency of appeal of deportation decision even if aliens concede deportability). At least three positive factors would have supported appellant's application for discretionary relief pursuant to § 1182(c): (1) it is not disputed that his father was a United States citizen; (2) it is not disputed that appellant lived in the United States from when he was four years old until he was deported when he was 19 years old; and (3) it is not disputed that if appellant had been born in the United States rather than in Mexico he would automatically have been a citizen. 8 U.S.C. § 1401(a) (Supp. 1996). To be sure, appellant's conviction for possession of cocaine would factor negatively into his application for discretionary relief from deportation. The conviction might have been mitigated, however, by the facts that he was a teenager when he was convicted and that he was convicted for possession but not for selling drugs.

In any event, in order to establish prejudice, appellant need not prove that he would have obtained relief from deportation. Instead, appellant need prove only that there were plausible grounds for relief. *Jimenez-Marmolejo*, 104 F.3d at 1086. He has made that showing. Indeed, in district court, the government conceded on this point that he "would have a reasonably

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provision of subsection (a) [which lists classes of excludable aliens].

Although the statute's literal language applies only to exclusion proceedings, it has been held to apply to deportation proceedings as well. *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995).

good chance, in fact, a very good chance to get the relief he needed to stay in the United States." CR at 67-68. Given this "very good chance" to obtain some relief on appeal, appellant has shown that he was prejudiced by the invalid waiver of his appeal right and by the erroneous legal advice of the IJ.[5]

Because Ahumada-Aguilar has shown that he was prejudiced by due process defects in his underlying deportation hearing, we should hold that his deportation was invalid. Accordingly, we should reverse his conviction for illegal reentry into the United States as a felon.

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[5] Contrary to the IJ's legal advice at the deportation hearing, discretionary relief from deportation pursuant to 8 U.S.C. § 1182(c) was appellant's sole remaining chance for legal residence in this country. By discouraging appellant from appealing the deportation decision, the IJ helped foreclose his chances to benefit from an appeal.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case CR 95-339Z

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICARDO AHUMADA-AGUILAR, DEFENDANT

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE THOMAS S. ZILLY,
UNITED STATES DISTRICT JUDGE

November 8, 1995*

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* * * * *

[69] [THE COURT]: The defendant has made a number of other claims which were briefed earlier and argued earlier. One, the defendant argued that he was entitled to claim citizenship under 8 USC Section 1401, et. seq. and particularly Section 8 USC Section 1409.

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* The transcripts of proceedings on different days are bound together. The transcipt of proceedings on November 8 begins on page 47.

I believe that the defendant's briefs and affidavits do not satisfy that section and the motion cannot be granted to dismiss the indictment based on that section.

There was no evidence that the father agreed in writing to provide financial support to the defendant when he was a minor or that the father either legitimized the defendant under state law, acknowledged him under oath or was adjudicated to be the father.

Finally the defendant argues that Section 1409 of the applicable USC chapter 8 violates the equal protection clause. That argument is foreclosed by *Ablang v. Reno*, 52 F.3d 801 (9th Cir. 1995). For all of these reasons, the motion to dismiss the indictment must be denied.

* * * * *

[82] THE COURT: Don't I have to wait until I hear his evidence before I can tell you whether that goes to the jury or not?

MR. RENO [for the government]: Well, Your Honor, I was under the impression from the comments that you were making that you were going to act in an in limine nature on this 1409 issue. And it's something I feel very strongly about. And if could I just for a second tell you why.

It's because I feel that the inherent prejudice from these issues being flown into the jury box by defendant's mother, possibly by other relatives, I think is highly prejudicial.

And it's [the] kind of prejudice that cannot be eradicated by Your Honor at the conclusion of the trial

saying that, giving a special instruction telling them that they must now erase from their minds these issues because as a matter of law, they have not been met.

I think that if Your Honor is going to make a decision that 1409 is not an issue in this case, then it should be removed from the trial at the outset and should not be waffled into the jury box during the trial and then attempting to remove it from of [*sic*] the jurors' mind.

I think when you talk about the citizenship issues, motherhood, the amount of time that this gentleman has been in the country, and you bring this in before the jury and then you make a ruling at the conclusion of case that none of this is of [83] any consequence, I think that it puts the government in an extremely prejudicial position.

I am not — I'm mindful of jury nullification. I'm mindful of what juries do in spite of judges' instructions. And I think that it's one of the hard rulings that the Court has to make in this case. Because Your Honor has analyzed these 1409 issues very succinctly, and unless the defendant in this case can bring before this Court the predicate that we're aware of, why does it become a jury question?

This is an affirmative defense. This is not something that the government has to prove in the negative. We don't have a burden to disprove 1409. We have the burden to prove that he is an alien.

And before he can offer testimony on [an] affirmative defense, I think he should make an offer of proof. If he cannot satisfy the Court on an offer of proof that there is a basic foundation, then I believe that it's highly

prejudicial under Rule 403, it's not relevant and I think it should be excluded. Thank you.

THE COURT: You want to be heard again on that issue, briefly?

* * * * *

[84]MR. FILIPOVIC [for the defendant]: I am prepared to make an offer of proof at this time.

THE COURT: Go ahead.

MR. FILIPOVIC: The offer that I would make would be, first, that we would present the testimony of again Genoveva Hernandez. As I indicated earlier, the substance of her [85] testimony is contained in the exhibits to the pretrial motions in an affidavit.

THE COURT: Can you give me a reference in the court file?

MR. FILIPOVIC: I believe it is—

THE COURT: What docket number it is?

MR. FILIPOVIC: I believe it's exhibit A, which was submitted with the original motion to dismiss, the two original motions to dismiss which were filed on August 24th, 1995.

THE COURT: I have it, let me read it. All right. I had read it prior, but I wanted to read it again. I have those facts and they'll be considered part of your offer of proof. Do you have anything further?

MR. FILIPOVIC: Yes, Your Honor. In addition, I would plan on calling defense investigator Lydia

Serafin to essentially detail the efforts she has made to corroborate the credibility of what Ms. Genoveva Hernandez has told us and that is in this affidavit. To the extent her affidavit, which is listed as exhibit B, accomplishes that goal, that would be essentially what her testimony would present.

In addition, exhibit D to the pretrial motions, the certificate of birth for Fred Deutenberg, establishing that he was born in the United States. And, also, his certificate of death from the State of California, which again reflects that he was born in the United States. That, I think, would be important [86] evidence to establish his U.S. citizenship because that is element number 2 under 1409.

In addition, I would seek to admit some of the criminal records of Mr. Deutenberg for basically two reasons. One, again, to corroborate Ms. Hernandez' expected testimony about his activities.

To also corroborate the fact that the FBI was looking for him, her credibility on that point because there is a bail-jumping conviction in there.

And finally, to establish that, in fact, he was within the control of the government for a period of time in the mid to late — early-mid 1970s. And also to lay a foundation for the argument that it's certainly possible that there could have been some records while he was on parole that he acknowledged the paternity of Ricardo Ahumada-Aguilar. Again, no known affirmative evidence to that effect, but some circumstantial evidence which would allow me to make that argument to the jury.

Your Honor, the only other possible evidence I could present on this issue would be a witness that could perhaps testify to the procedures employed by the probation and parole department in terms of how people are supervised, what type of financial statements they're required to submit, what type of information they are required to give their officers while they're on parole.

Again, there's no affirmative evidence of any individual that [87] had personal contact with Mr. Deutenberg on these issues, but more in the vein of general information for the jury as to what could conceivably have occurred here. That is the extent of the offer.

THE COURT: All right. Based on that offer of proof, the Court rules that the defendant — and I take it further you're prepared to stipulate that those are all of the facts you have and you would not have any additional facts at the time of trial?

MR. FILIPOVIC: Unless, of course, something shows up from the FBI between now and Monday.

THE COURT: Well, if something shows up, I'll let you reopen. But for purposes of this case, the Court is going to rule that your offer of proof fails to satisfy 8 USC Section 1408 [*sic*] in at least two respects. There are four factors that need to be established.

I'm going to assume for purposes of my statement that you have made a showing or that everything in particularly the affidavit of the mother is true and correct. I think that would satisfy one and two, of a blood relationship between the person and the father

and that the father had the nationality in [*sic*] the United States.

But there is no evidence whatsoever of item three, that the father agreed in writing to provide financial support for the person until the person reached the age of 18, and, four, that [88] while the defendant was under the age of 18, the defendant was legitimized under the law of the defendant's residence or domicile or that the father acknowledged paternity of the person in writing under oath or paternity of [the] person is established by adjudication of a competent court.

As a matter of fact, the mother's declaration, particularly paragraph 20, is strong evidence that those factors were not satisfied. That paragraph of her affidavit, which is exhibit A to the exhibits filed in support of the pretrial motions by the defendant, states that after leaving Fred Deutenberg prior to the birth of the son, Ricardo, I, that being the mother, had no further contact with Mr. Deutenberg, did not know where or how to find him. And although she made several attempts, the father never appeared in any way.

Under all the circumstances, I must find that the defendant has failed to present by clear and convincing evidence or by any other standard evidence that would permit this issue to go to the jury. And I'll preclude the defendant from offering any such testimony at the time of trial, unless you move to reopen based on newly discovered evidence between now and Monday morning.

* * * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-30065

D.C. No. CR-95-00339-1-TSZ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICARDO AHUMADA-AGUILAR,
A/K/A RICARDO AHUMADA;
A/K/A RICARDO ALFONSO HERNANDEZ,
DEFENDANT-APPELLANT

[Filed: Dec. 22, 1999]

ORDER

Before: SCHROEDER, ALARCON, and KLEINFELD, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.